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in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

No. 72-1203

JOHNNY SIMPSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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JOHNNY SIMPSON,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS OF THE COURT BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered on January 10, 1973 is unreported. A copy is attached as Appendix "A".

A Petition for Rehearing was denied without opinion on February 1, 1973.

JURISDICTION

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

WHETHER THE SENTENCE IMPOSED CONSTITUTES A VIOLATION OF DUE PROCESS AND HARSH AND UNUSUAL PUNISHMENT IN THAT BEFORE IMPOSITION OF SENTENCE CONGRESS ELIMINATED THE MINIMUM MANDATORY SENTENCE FOR DEFENDANT'S CRIME.

II

WHETHER A COURT VIOLATES A DEFENDANT'S RIGHT TO DUE PROCESS IN FAILING TO GRANT A HEARING ON A MOTION TO REDUCE SENTENCE WHERE SUBSTANTIAL AND SIGNIFICANT CHANGES OF CIRCUMSTANCES OCCUR BETWEEN THE TIME OF SENTENCING AND THE FILING OF THE MOTION.

STATUTES INVOLVED

21 U.S.C. 176(a) (repealed).

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been in-

voiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000. . . . "

21 U.S.C. 841(b)(1)(b):

" . . . In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more

than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment . . . "

Section 1103 of Pub. L. 91-513 provided that:

"(a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 (the first day of the seventh calendar month that begins after Oct. 26, 1970) shall not be affected by the repeals or amendments made by such section or section 1102 (repealing this section and sections 172, 173, 173a, 174, 176 to 184, 184a, 185, 188 to 188n, 191 to 193, 197, 198, 199, 501 to 517 of this title sections 1401 to 1407 and 3616 of Title 18, sections 4701 to 4771, 7237, 7238, and 7491 of Title 26, sections 529a and 529g of Title 31, and 1421M of Title 48, and amending former section 162 of this title and section 4251 of Title 18, section 1584 of Title 19, sections 4901, 4905, 6808, 7012, 7103, 7326, 7607, 7609, 7641, 7651 and 7655 of Title 26, section 2901 of Title 28, sections 529d, 529e, 529f, and 1034 of Title 31, section 304m of Title 40, section 3411 of Title 42 section 239a of Title 46, and section 787 of Title 49), or abated by reason thereof . . ."

STATEMENT OF THE CASE

On July 8, 1971, Petitioner was indicted for violation of 21 U.S.C. 176(a) the importation of narcotic drugs and conspiracy to import marijuana.

After a trial by jury Petitioner was found guilty on August 19, 1971 and sentenced to two concurrent terms of five years imprisonment on September 21, 1971.

On appeal the judgment was affirmed by the United States Court of Appeals on May 19, 1972.

On July 6, 1972, Petitioner Petitioned the District Court to stay the impositions of sentence. A two week stay was granted on July 7, 1972.

On July 11, 1972 Petitioner filed his Motion for Mitigation of Sentence pursuant to Rule 35 Federal Rules of Criminal Procedures. The government's response was filed July 20, 1972.

On August 16, 1972, the court entered its order denying Petitioner's Motion for Reduction of Sentence.

Petition for rehearing filed August 21, 1972 was denied on August 21, 1972. The Petition for rehearing was denied by Judge C. Clyde Atkins in the absence of Judge James Lawrence King.

At no time was Petitioner granted a hearing or permitted to present witnesses on his own behalf.

Notice of Appeal was timely filed on August 25, 1972.

The motion set forth that the original five year sentence was excessive and should be reduced because:

1. The original pre-sentence investigation showed Petitioner to be a second offender, but his other conviction had since been set aside.

2. Petitioner's participation in the alleged conspiracy had been very minor involving only driving someone to an airport and removing seats from an airplane.

3. At the time of trial, Petitioner was offered a recommendation of probation by the prosecuting attorney which he refused in an attempt to prove his innocence.

4. Petitioner demonstrated his rehabilitation.

5. Petitioner was only 20 years old at the time of the offense.

The government's response raised the issue, that since at the time of the offense there was a mandatory five years sentence, even though this statute has since been repealed 21 U.S.C. 176(a) the defendant is entitled to no relief.

Petitioner appealed to the United States Court of Appeal Fifth Circuit raising the following points of law:

I.

"THE SENTENCE IMPOSED CONSTITUTES A VIOLATION OF DUE PROCESS AND HARSH AND UNUSUAL PUNISHMENT IN THAT SHORTLY BEFORE IMPOSITION OF SENTENCE CONGRESS ELIMINATED THE MINIMUM MANDATORY SENTENCE FOR DEFENDANT'S CRIME.

II.

"THE COURT ERRED IN FAILING TO GRANT A HEARING ON PETITIONER'S MOTION TO REDUCE SENTENCE WHERE SIGNIFICANT CHANGES HAD OCCURRED IN PETITIONER'S CIRCUMSTANCES SINCE THE ORIGINAL IMPOSITION OF SENTENCE.

On January 10, 1973, United States Court of Appeal in per curiam decision affirmed the Order of the lower Court. On February 1, 1973 the Petition for Rehearing was denied without opinion.

ARGUMENT FOR ALLOWANCE OF WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL AS TO THE APPLICATION OF THE SAVINGS PROVISIONS OF 21 U.S.C. 801, et seq.,

Petitioner was sentenced pursuant to 21 U.S.C. 176(a), which provides for a minimum mandatory sentence of

five years (26 U.S.C. 7237) Twenty-one (21) U.S.C. 174(a) and its mandatory sentence provisions were repealed effective May 1, 1971 and replaced by the present statute which has no mandatory provision.

The crimes charged in the indictment took place prior to May 1, 1971, however, trial and sentencing were after that date.

The purpose of this appeal is not to challenge the legality of the original sentence but rather to establish that the District Judge can reduce the sentence in conformity with the new statute if he wishes to do so.

The 1970 act (Sec. 1101) repeals 21 U.S.C. 176(a) and 26 U.S.C. 7237(d) effective May 1, 1971, four months prior to appellant's sentencing. However, there are two saving clauses which effect crimes committed prior to the effective date.

1. Section 1102(a) of the new act provides:

> Prosecutions for any violation of law occurring prior to the effective date of Section 1101 shall not be affected by the repeals or amendments made by such section . . . or abated by reason thereof . . ."

2. 1 U.S.C. 109 provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability . . ."

In the case of **United States v. Stephens** (9th Cir. 1971) 449 F. 2d 103, the Court of Appeals held that a District Judge did not err in giving probation to defendants who were tried prior to May 1, 1971 but sentenced on May 24, 1971.

The court after considering the two saving clauses quoted above reached the conclusion that it was their purpose to prevent offenders not brought to trial prior to May 1, 1971 from escaping prosecution. However, the court held:

> "The purpose of the section has been served when judgment under the old act has been entered and abatement of proceedings has been avoided. At that point litigation has ended and appeal available **Korematsu v. United States**, 319 U.S. 423, 63 S.Ct. 1124, 87 2d 1487 (1943). What occurs thereafter—the manner in which judgment is carried out, executed or satisfied, and whether or not it is suspended—in no way affects the prosecution of the case."

The court explains that the new act reflects the current view that probation should be available for these offenses.

Certainly, the legislative intent of the new act was not to proscribe more severe penalties for marijuana cases occurring before May 1, 1971 but rather to preserve the continuity of prosecutions so that defendants apprehended between the passage of the new act and its effective date would not escape prosecution. **Vol 3, 1970 U.S. C.C.A. 4566 4675.** In the case of **United States v. Fiotto,**

454, F 2d 252, (2d Cir. 1972) the court relying on the saving clause held that in a heroin case, the appellants must be sentenced under the old act.

It is respectfully submitted that the Petitioner has been denied due process of law because he has been subjected to a greater penalty for the same crime as another person who may have done the same act a few months later.

If the saving clause is read in conjunction with obvious intent of the new statute the inescapable conclusion must be that the penalty aspect of the old law is not preserved for persons tried and sentenced after the effective date of the new law.

Two cases presently before this court apparently raised the same issue of law. Those cases are **Wollack v. U.S. 71-992** and **Bradley v. U.S. 71-1304.**

2. THE COURT ERRED IN FAILING TO GRANT A HEARING ON PETITIONER'S MOTION TO REDUCE SENTENCE WHERE SIGNIFICANT CHANGES HAD OCCURRED IN PETITIONER'S CIRCUMSTANCES SINCE THE ORIGINAL IMPOSITION OF SENTENCE.

The Motion for Reduction of Sentence made pursuant to Rule 35, in addition to citing Petitioner's rehabilitation, his youth and his small involvement in the commission of the crime raises one additional ground that Petitioner's prior record has now changed.

At the time Petitioner was originally sentenced he was a second offender having been previously convicted of a crime.

During the pendency of the appeal in this case the prior conviction was vacated.

Recent cases have held that where there is a material change in a defendant's prior criminal record, which may have affected the judge's sentencing, the District Court should hold a hearing to consider its sentence.

In the case of **McGee v. United States**, 465 F 2d 357, the 2nd Circuit overturned a trial judge's discretionary refusal of a Motion to Reduce sentence pursuant to Rule 35. The court said that sentencing within the legal maximum is discretionary but in the special circumstances of that case a refusal unaccompanied by any explanation was an abuse of the trial courts' discretion. In the **McGee** case, the defendant was sentenced to several concurrent two-year sentences and one of them apparently, the most important one was struck down on appeal. The remaining sentences were for separate crimes but crimes which were collateral to the one which was reversed.

The majority opinion stated that while the lower court is not compelled to mitigate the sentence, it must either reduce the sentence or state its reasons for not doing so.

At this point, it should be noted that since Petitioner was not permitted a hearing evidence of the vacation of his prior conviction does not appear in the record on appeal.

The United States Supreme Court has held in the case of **United States v. Tucker**, 405 U.S. 443, 10 CrL 3053, that where the possibility existed that a Federal Judge

would have imposed a lesser sentence on a bank robbery defendant had he known that two of the defendant's three prior convictions which were relied upon at the time of sentencing were constitutionally invalid as being in violation of the defendant's right to counsel, the case would be remanded to the trial court for reconsideration of sentence.

In the case at bar, the Petitioner requested a hearing several times and was refused such a hearing and the relief requested was denied without reason. Although, the Petition for Rehearing states that the court carefully considered the defendant's petition, it should be noted that it is signed by an emergency judge in the absence of the judge who had handled the case up until that time.

The relief demanded in this appeal is for the Court of Appeals to remand the case to the trial court for a hearing on Petitioner's Motion to Reduce Sentence and for the Court to state its reasons if it in fact denies the motion.

In the earlier case of **Burgett v. Texas**, 389 U.S. 109, 88 S.Ct. 258, L.Ed. 2d 319, the Supreme Court held that where a prior conviction from another state wherein defendant was not assisted by counsel was admitted into evidence, the defendant was being denied his Sixth Amendment Right all over again even though he was not being prosecuted under the recidivist statute. The Supreme Court reversed the conviction and sent the case back for a new trial holding that to permit a court which is sentencing a defendant to consider an invalid prior conviction would operate as a denial of the Federal right which was violated in the original invalid case.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted.

DATED at Miami, Florida this ____ day of March, 1973.

Respectfully submitted,

LAW OFFICES OF
MAX P. ENGEL
Attorney for Petitioner
1461 N.W. 17th Avenue
Miami, Florida 33125 (633-9743)

BY:_____
MAX P. ENGEL

DAVID B. JAVITS
Of Counsel

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing Petition for Writ of Certiorari has been mailed this ____ day of March, 1973, to the Honorable Robert Rust, United States Attorney, Ainsley Building, Miami, Florida.

MAX P. ENGEL

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2907
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHNNY SIMPSON,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(January 10, 1973)

Before BROWN, Chief Judge, GOLDBERG, and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2907
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHNNY SIMPSON,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

[Filed February 1, 1973]

(FEBRUARY 1, 1973)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, GOLDBERG, and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2917
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHNNY SIMPSON and
ALFRED WILLIAM HARRISON,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(May 19, 1972)

[Filed June 19, 1972]

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

PER CURIAM: Appellants Alfred W. Harrison and Johnny Simpson and five others were charged by a three-count indictment with (1) conspiracy to import marijuana into the United States in violation of 21 U.S.C. §176(a); (2) importation, on or about January 27, 1971, of six hundred pounds of marijuana in violation of 21 U.S.C. §176(a) and 18 U.S.C. §2; and (3) importation, on or about March 14, 1971, of five hundred and ten pounds of marijuana in violation of 18 U.S.C. §2. A jury found both defendants guilty on counts one and two.[1] Harrison was sentensed to serve fifteen years on each count with the sentences to run concurrently. Simpson was sentenced to serve five years on each count with the sentences to run concurrently.

On appeal, Simpson challenges the sufficiency to the evidence offered by the Government. After carefully reviewing the evidence on counts one and two, and as we must for purposes of appellate review, viewing the evidence in the light most favorable to the Government, Glasser v. United States, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, we conclude that there was ample evidence from which the jury could conclude that Simpson was guilty of the offenses charged.

Harrison argues that the trial judge erred in requiring Harrison's counsel to go to trial without adequate opportunity for preparation. The granting of a continuance is, however, entrusted to the sound discretion of the district court. We detect no abuse of the Court's exercise of that discretion in the present case. See Ungar v. Sarafite, 1964, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921; Avery v. Alabama, 1940, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 327;

[1]Harrison was not named in count three. Simpson's motion for judgment of acquittal was granted as to count three.

United States v. Gower, 5 Cir. 1971, 447 F.2d 187; United States v. Fuentes, 5 Cir. 1970, 432 F.2d 405; United States v. Johnson, 5 Cir. 1969, 417 F.2d 332; McKissick v. United States, 5 Cir. 1967, 379 F.2d 754. Harrison was not deprived of effective assistance of counsel. Our review of the record reveals that Harrison was adequately represented.

Harrison also complains of a remark to the jury made by the Assistant United States Attorney during closing argument. The remark when viewed in the context of the cautionary instruction given by the trial judge, was not reversible error. See F.R.Crim. P. 52(a).

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ Susan Le Brun
Deputy

New Orleans, Louisiana JUN 12 1972

APPENDIX D

MOTION FOR MITIGATION OF SENTENCE

(Number and Title Omitted) (Filed Jul 11, 1972)

JOHNNY SIMPSON through his undersigned attorneys moves this Court to mitigate and reduce his sentence in the above styled cause pursuant to Rule 35 Federal Rules of Criminal Procedure and states:

1. Defendant was convicted of violation of 21 U.S. Code, Section 176a two counts and Defendant was sentenced to two concurrent sentences of five years imprisonment.

2. The Defendant's appeal to the United States Court of Appeal, Fifth Circuit resulted in an affirmance on May 19, 1972.

3. The Court should consider mitigation in this case based upon the following facts.

4. At the time the Defendant was sentenced he stood convicted of another crime, however, Defendant's conviction was reversed and the other case stands dismissed.

5. Defendant has no other significant prior criminal record.

6. Defendant was only 20 years old at the time of the alleged commission of this crime and is only 21 years old at the present time.

7. The evidence adduced at trial taken in the light most favorable to the government's position shows that the Defendant earlier played only a very minor role in the conspiracy to import marijuana, and in fact, his only overt act involved driving someone to an airport in Orlando and removing some seating from an airplane. The Defendant played no part in the overall plot and could certainly not be described as a ring leader.

8. At the time of trial, the Defendant was offered a recommendation of probation by the prosecuting attorney which he refused on the advice of counsel in order to prove his innocence.

9. Since the time of the offense, more than one and a half years has past and Defendant has been in no further trouble with the law.

10. Defendant is steadily and regularly employed and has shown by his conduct that he has attempted to rehabilitate himself and that he has no inclination to continue in a life of crime and is therefore an excellent candidate for probation.

11. The crime for which the Defendant stands convicted is not a crime of violence.

12. The sentence of five years imprisonment constitutes harsh and unusual punishment in light of the fact of the Defendant's small involvement in the crime, his youth and prior record.

WHEREFORE, it is respectfully prayed that this Court will consider Defendant's application for mitigation and grant the following relief.

1. Order a Post Sentence Investigation by the probation department to determine whether the Defendant's changed circumstances would warrant a recommendation of probation.

2. Inasmuch as Defendant is a first offender, the Court is asked to consider resentencing Defendant under the provisions of 18 U.S. Code, Section 4208a(2) which provides his eligibility for parole at an earlier date if the Board of Parole so recommends, or re-sentence the Defendant under the provisions of 18 U.S. Code, Chapter 402 as a youthful offender or 18 U.S. Code, Section 4209 as a young adult offender. Any of these alternatives would permit consideration for early parole and are designed for a youthful offender or a first offender.

3. It is further prayed that the Court order a postponement of surrender until the Court has the opportunity to consider the merits of this Motion.

Respectfully submitted,

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By s/ Max P. Engel

MAX P. ENGEL

APPENDIX E

ORDER GRANTING FURTHER EXTENSION OF IMPOSITION OF SENTENCE AND FOR POST SENTENCE INVESTIGATION

(Number and Title Omitted) (Filed Jul 19, 1972)

THE COURT, upon Defendant's Motion To Mitigate, and being fully advised in the premises, thereupon has

ORDERED and ADJUDGED that a Post Sentence Investigation be conducted in this cause.

It is further, ORDERED and ADJUDGED that the Defendant be granted a thirty (30) day stay from the 20th day of July, 1972, to surrender himself to the United States Marshal for this District, to begin serving the sentence imposed by this Court on the 21st day of September, 1971.

DONE and ORDERED this 18 day of July, 1972, at Miami, Dade County, Florida.

s/ James Lawrence King
UNITED STATES DISTRICT COURT JUDGE

cc: U. S. Attorney (Wagner)
U. S. Marshal
Chief Probation Officer
Max P. Engel, Esq.

APPENDIX F

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR MITIGATION OF SENTENCE

(Number and Title Omitted) (Filed Jul 20, 1972)

COMES NOW, the Plaintiff, United States of America, by and through its undersigned attorney, in opposition to the motion of the Defendant, Johnny Simpson, for mitigation of his sentence in the above-styled cause, and moves this Honorable Court to deny Defendant's motion, showing reason therefore the following:

Point 1

Whether the Defendant is eligible to be considered for re-sentencing under the provisions of Title 18, United States Code, §4208 (a) (2), and Title 18, United States Code, §4202 or Title 18, United States Code, §4209.

Defendant Simpson's request for consideration under any of sections cited is without merit and should be denied. The Attorney for the Defendant failed to note to the Court that the provisions of any of the three alternatives proposed do not apply in this case.

The Defendant was convicted under Title 21, United States Code, & 176a which states that provisions for sentencing and probation are to be found in Title 26, United States Code, §7237 (d).

Defendant's request regarding Title 18, United States Code, §4202 can be dismissed by provisions Title 26, United States Code, §7237 (d) which states that:

"Upon conviction. . . . the imposition or execution of sentence shall not be suspended, proba-

tion shall not be granted, and in the case of a violation of a law relating to narcotic drugs, section 4202 of Title 18, United States Code, and The Act of July 15, 1932, as amended, shall not apply". Title 26, United States Code, §7237 (d)

As to Defendant's request for resentencing under Title 18, United States Code, §4208 a (2) and Title 18, United States Code, §4209, the statute provides that these acts "do not apply to any offense for which there is provided a mandatory penalty".

Title 18, United States Code, §4208 and 4209.

The mandatory penalty provisions under Title 21, United States Code, §176a states that one convicted thereunder shall be imprisoned for "not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

The Government further notes that the petitioner's sentence of imprisonment for five years (to run concurrently) were well within the limits set for violation of Title 18, United States Code, §176a even as to first offenders and youthful offenders. It is evident, therefore, that the petitioner received the minimum sentence possible.

The Court has already imposed the minimum possible sentence under statutory mandate and is without power to mitigate the sentence at all.

ROBERT W. RUST
UNITED STATES ATTORNEY

By: s/George A. Kokus

Assistant United States Attorney

APPENDIX G

ORDER DENYING DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE

(Number and Title Omitted) (Filed Aug 16, 1972)

THIS CAUSE came on for consideration upon motion of the Defendant, Johnny Simpson, for reduction of sentence.

The Court, being well advised in the premise, it is therefore,

ORDERED and ADJUDGED that Defendant's motion for reduction of sentence be and the same is hereby denied.

DONE and ORDERED in chambers, at Miami, Florida, this 15 day of August, 1972.

s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 71-417-Cr-JLK

UNITED STATES OF AMERICA
vs.

JOHNNY SIMPSON,
Defendant.

Filed Aug 21, 1972

PETITION FOR REHEARING

JOHNNY SIMPSON, through his undersigned attorney moves this court to rehear and reconsider its Order dated August 15, 1972 on the following grounds:

1. The Court overlooked and failed to consider that if the Defendant was permitted to appear before the Court to offer testimony in support of his Motion to Mitigate, new additional matters which were not available for consideration could have been brought to the Court's attention.

2. The Court in its Order of July 18, 1972 ordered that a Post Sentence Investigation be conducted in this cause. Recent federal appellate cases have held that where a prior conviction forms at least a part of the basis for Defendant's sentencing a reversal of the prior conviction

may entitle the Defendant to a re-consideration of the instant sentence. United States Court of Appeal has also held that in the case of a Pre Sentence Investigation and presumably in a case of a Post Sentence Investigation Defendant's counsel is entitled to be informed of at least that portion of the report which deals with Defendant's prior record. United States v. Tucker, 10 Cr. L 3505 and United States v. Janiec 11 CrL 1070.

3. Defendant also questioned whether a thorough Post Sentence Investigation was performed inasmuch as no one contacted him to verify whether he is regularly employed and other information which would have to be determined from speaking with the Defendant himself.

4. The sentence of five years imprisonment in this cause constitutes harsh and unusual punishment in light of the fact of the Defendant's small involvement in the crime, his youth and criminal record.

5. In a case squarely on point with the case at bar, the United States Court of Appeals, 2nd Circuit held that where special circumstances are presented on a Motion for Mitigation under Rule 35 Federal Rules of Criminal Procedure, a District Judge committed error in summarily denying the Motion without stating his reasons for doing so. McGee v. United States, 11 CrL 2169.

In the McGee case, the Defendant was sentenced to several concurrent two-year sentences on related counts dealing with Selective Service violations. The Defendant asked for reduction of sentence on the other counts when his conviction on the most important of the 4 counts was reversed. This case is analogous to the case at bar in that,

at the time Simpson was originally sentenced, he was a second offender having previously been convicted of another crime. However, since the Defendant's sentencing, the other conviction has been reversed and he now stands before the Court with a clean criminal record.

6. In addition, the Defendant has presented several other new circumstances in support of his Motion for Mitigation.

7. It is respectfully submitted that the Court's summarily denial of Defendant's Motion to Mitigate without explanation and without a hearing constitutes denial of equal protection.

WHEREFORE, Defendant prays this Court will reconsider its earlier order and grant Defendant a hearing to present information to the Court in support of his Motion to Mitigate Sentence.

Respectfully submitted,

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By s/David B. Javits
DAVID B. JAVITS

APPENDIX I

MOTION FOR STAY OF IMPOSITION OF SENTENCE

(Number and Title Omitted) (Filed Aug 21, 1972)

JOHNNY SIMPSON through his undersigned attorney moves this Court to order a stay of imposition of sentence on the following grounds:

1. On August 15, 1972 the Defendant's Motion for Mitigation of Sentence was denied.

2. The Defendant is presently scheduled to surrender to begin serving his sentence on August 18, 1972.

3. Several matters in support of the Motion to Mitigate were excluded from the original Motion because they were matters which could best be brought out through testimony.

4. A Petition for Rehearing has been filed and is awaiting the Court's consideration. This Petition raises a serious constitutional question regarding a reversed prior conviction which may have been the basis for the sentence imposed in this case.

5. An extreme hardship would be placed upon the Defendant if he is forced to resign from his employment and put his belonging in storage while there remains a substantial chance that his sentence may be mitigated.

6. This Motion is not made for purposes of delay only but to protect and preserve the Defendant's rights.

WHEREFORE, Defendant prays this Court will enter its Order staying imposition of sentence until September 15, 1972.

LAW OFFICES OF
MAX P. ENGEL
Attorney for Defendant
1400 N.W. 10th Avenue
Suite 17-G
Miami, Florida 33136
379-3811

By_____
DAVID B. JAVITS

APPENDIX J

ORDER DENYING PETITION FOR STAY AND MOTION FOR REHEARING

(Number and Title Omitted) (Filed Aug 21, 1972)

This cause came on for consideration upon defendant's motion to stay the imposition of sentence and petition for rehearing of the motion to mitigate. The court carefully examined the post-sentence investigation prepared in this case and has carefully examined the minimum maximum sentence which was imposed herein. The court is further convinced that the sentence heretofore imposed was proper and just. It is therefore,

ORDERED and ADJUDGED that defendant's Petition for Rehearing and Motion for Stay be and the same are hereby denied. The defendant is further ordered to surrender himself to the United States Marshal to begin serving his sentence as previously scheduled.

DONE and ORDERED this 21 day of August, 1972 at Miami, Dade County, Florida.

s/C. Clyde Atkins

UNITED STATES
DISTRICT JUJDGE

for Judge James Lawrence King
4:40 P.M.

cc: United States Attorney, Miami, Florida
United States Marshall, Miami, Florida
United States Probation Office, Miami, Florida
Max P. Engel, 1400 N.W. 10th Avenue, Miami, Florida

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1203

JOHNNY SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted on July 8, 1971, for conspiring to import marijuana and for importing six hundred pounds of that substance on or about January 27, 1971, in violation of former 21 U.S.C. 176a (repealed, May 1, 1971, by P.L. 91-513, the Comprehensive Drug Abuse Prevention and Control Act). He was convicted after a jury trial in the United States District Court for the Southern District of Florida, on August 19, 1971, and was subsequently sentenced to concurrent terms of five years' imprisonment. After unsuccessfully appealing his conviction, he moved for a reduction of sentence pursuant to Rule 35, Fed. R. Crim. P., claiming that he was improperly given a mandatory sentence since he was tried and convicted after 21 U.S.C. 176a had been repealed.

This Court has recently held that, pursuant to the saving clause in the new Drug Abuse Act (Section 1103(a)), the mandatory sentencing provisions of the statutes repealed by that Act remain in effect for violations occurring prior to repeal. *Bradley* v. *United States*, No. 71-1304, decided March 5, 1973. It follows that the district court had no authority to grant petitioner's motion for reduction of sentence and a hearing on his motion would have served no useful purpose.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.